

R. KEITH BARRETT

IBLA 91-187

Decided June 12, 1992

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring mining claims abandoned and void. CMC 191179, et al.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Federal Land Policy and Management Act of 1976: Service Charges--Mining Claims: Recordation of Certificate or Notice of Location

Under 43 CFR 3833.1-4(a), where a mining claimant submitted affidavits of assessment work and the accompanying check for service charges was not honored by his bank, it was improper for BLM to reject the affidavits without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

APPEARANCES: R. Keith Barrett, Broomfield, Colorado, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

R. Keith Barrett, on behalf of Gold Crest Resources, Inc., has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated February 6, 1991, declaring a total of 358 unpatented mining claims (listed in the Appendix to this order) abandoned and void. The basis for BLM's decision was that the check which accompanied Barrett's affidavits of labor for the filing period ending December 30, 1990, was not honored by his bank. 1/ A handwritten notation on the affidavits of labor

1/ The check, which was drawn in the amount of \$3,190, was submitted to cover the filing fees for the affidavits of labor for the claims involved in this appeal, as well as annual filings for other claims, not subject to BLM's Feb. 6, 1991, decision. Those other claims are:

CMC-181114 - CMC-191149	Gold Reef #1-36
CMC-192524 - CMC-192532	Golden Slipper #1-9
CMC-191090 - CMC-191113	Gold Rouge #1-24
CMC-191690 - CMC-191732	Golden Egg #1-43
CMC-191733 - CMC-191784	Gold Bank #1-52

("POSTED 12/31/90 LEK") indicates that they arrived in an envelope postmarked December 31, 1990. 2/ The affidavits bear a BLM date stamp of January 3, 1991.

In its decision, BLM explained the rationale for its action as follows:

The Interior Board of Land Appeals established policy guidance for checks that are not honored by the claimants bank in Glen W. Taylor, 67 IBLA 393 (1982). The Board states at pages 395 and 396:

"The applicable regulation, 43 CFR 3833.1-2(d), states that a location notice for each claim shall be accompanied by a service fee. It further provides that a notice or certificate of location shall not be accepted if it is not accompanied by the service fee and shall be returned to the owner. As this is a mandatory requirement, there is no recordation unless the documents are accompanied by the stated fee, or until it is paid. Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), aff'd, 649 F.2d 775 (10th Cir. 1981); William Scott Olsen, 65 IBLA 274 (1982)."

(Decision at 1).

In his statement of reasons, Barrett attributes the fact that his bank did not honor the check for service fees to "clerical oversight." However, he provides no evidence to support that assertion, such as a letter from the bank. In addition, there is no indication in the record that since the dishonoring of the check, he has tendered the necessary filing fees for the claims in question. Nevertheless, we must set aside BLM's decision and remand the case.

The Board case cited by BLM and quoted above is not controlling; Department regulations are. Regulation 43 CFR 3833.1-3(c) requires that annual filings submitted pursuant to 43 CFR 3833.2, such as affidavits of assessment work, shall be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site. In addition, 43 CFR 3833.1-4 provides:

fn. 1 (continued)

CMC-191650 - CMC-191689	Gold Ingot #1-40
CMC-191625 - CMC-191649	Gold Tower #1-25
CMC-232719 - CMC-232775	Gold Store #1-17, 17A, 18-45, 46, 47-55 & 60

We are unable to discern from the case file why these claims were not subject to BLM's decision.

2/ The envelope is not part of the record in the case.

(a) Prior to January 1, 1991. Filings that are not accompanied by the service charges set forth in § 3833.1-3 of this title shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of such deficiency notice by the authorized officer. Failure to submit the proper service charge shall cause the filing to be rejected and returned to the claimant/owner.

[1] The question presented by this appeal is whether BLM should have applied 43 CFR 3833.1-4(a) and provided Barrett with a deficiency notice. First, submission of a check, which upon presentment is dishonored by the bank on which it is drawn, does not constitute timely payment of the service fees for annual mining claim filings. ^{3/} See James S. Guleke, 9 IBLA 73, 74 (1973). Thus, Barrett's filings were "not accompanied by the service charges set forth in § 3833.1-3."

The regulation states that filings not accompanied by the required service fee will be considered "recorded on the date received," if the claimant submits the proper service charge within 30 days of receipt of a deficiency notice. The language of 43 CFR 3833.1-4(a) is intended to apply to both the recordation of mining claims and the annual filing requirement. The language works fine for the recordation of claims, but it is not appropriate for the annual filing requirement, because the regulation states that filings shall be considered "recorded on the date received." That conflicts with the language of 43 CFR 3833.0-5(m), defining "filed or file." That regulation provides that annual filings (but not location notices filed for recordation after October 21, 1976) will be considered timely filed if BLM receives them by January 19 after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law.

Thus, in this case Barrett's annual filings for 1990 must be considered timely filed for the purposes of 43 CFR 3833.2 (the annual filing regulations) because they were received on January 3, 1991, in an envelope postmarked December 31, 1990. However, under a literal reading of 43 CFR 3833.1-4(a), the date the filings were "received" was January 3, 1991, and the grace period regulation only applies to filings "received" prior to December 31, 1990. Nevertheless, we believe the grace period regulation must be read in conjunction with the regulation defining "filed or file," and we conclude 43 CFR 3833.1-4(a) is applicable to a case such as this where annual filings are posted on or before December 31, 1990, and received within the time deadline established by 43 CFR 3833.0-5(m).

^{3/} The preamble to the promulgation of 43 CFR 3833.1-4(a) states that the regulatory grace period was to be extended to those claimants who submitted filings without the fees or with insufficient fees. 53 FR 48879 (Dec. 2, 1988).

BLM did not apply 43 CFR 3833.1-4(a) in Barrett's case, but rather simply rejected his proofs of labor for the 1990 filing period and returned them to him under Glen W. Taylor, supra. This was improper. As this Board made clear in Bennie Sinerius, 115 IBLA 312 (1990), and in Herbert M. Cole, 115 IBLA 272 (1990), when an annual filing required to be filed prior to January 1, 1991, is not accompanied by the proper service fee, the appropriate course of action is for BLM to notify the claimant/owner that there is a deficiency, and that the claims will be rejected and returned if the amount of the deficiency is not submitted within 30 days of receipt of the notice.

Under 43 CFR 3833.1-4(a), it was improper for BLM to reject Barrett's proofs of labor without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee. Accordingly, we must set aside BLM's decision and remand this case to BLM to allow it to provide Barrett with the deficiency notice required by the regulation. Barrett's "[f]ailure to submit the proper service charge shall cause the filing[s] to be rejected and returned" to him under 43 CFR 3833.1-4(a).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and this case is remanded for further action consistent with this decision.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

John H. Kelly
Administrative Judge

APPENDIX

<u>Serial No.</u>	<u>Claim Name</u>
CMC-191179 - CMC-191182	Gold Crown #1-4
CMC-191183 - CMC-191197	Double Eagle #1-15
CMC-191198 - CMC-191219	Goldenrod #1-22
CMC-191220 - CMC-191264	Pot of Gold #1-45
CMC-191265 - CMC-191328	Golden Oldie #1-64
CMC-191329 - CMC-191416	Gold Bar #1-88
CMC-191417 - CMC-191420	Gold Bullion #1-4
CMC-191421 - CMC-191428	Gold Finger #1-8
CMC-191429 - CMC-191437	Golden Stairs #1-9
CMC-191438 - CMC-191457	Golden Eagle #1-20
CMC-191458 - CMC-191464	Gold Wing #1-7
CMC-191465 - CMC-191466	Gold Crest #2-3
CMC-191467 - CMC-191468	Gold Crest #5-6
CMC-191469 - CMC-191475	Gold Cloud #1-7
CMC-191476 - CMC-191509	Gold Acres #1-34
CMC-191510 - CMC-191529	Gold Acres #40-59
CMC-191530	Gold Acres #63
CMC-191531	Gold Acres #65
CMC-191532 - CMC-191536	Gold Acres #67-71